

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1200

Interpretation of "Children's Product"

[Docket No. CPSC-2010-0029]

AGENCY: Consumer Product Safety Commission.

ACTION: Final Interpretative Rule.

SUMMARY: The Consumer Product Safety Commission ("CPSC," "Commission," or "we") is issuing a final interpretative rule on the term "children's product" as used in the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314. The final interpretative rule provides additional guidance on the factors that are considered when evaluating what is a children's product.¹

EFFECTIVE DATE: This rule is effective [insert the date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT:

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¹ The Commission voted 3-2 to publish this final interpretative rule, with changes, in the Federal Register. Chairman Inez M. Tenenbaum, Commissioners Thomas Moore and Robert Adler voted to publish the final interpretative rule with changes. Commissioners Nancy Nord and Anne Northup voted against publication of the final interpretative rule. All of the Commissioners issued statements. The web address for Commissioners' statements is: <http://www.cpsc.gov/pr/statements.html>.

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SUPPLEMENTARY INFORMATION:

A. Background

Section 235(a) of the CPSIA amended section 3(a)(2) the Consumer Product Safety Act ("CPSA") by creating a new definition of "children's product." 15 U.S.C. 2052(a)(2). "Children's product" is defined as "a consumer product designed or intended primarily for children 12 years of age or younger." Several CPSIA provisions use the term "children's product." Section 101(a) of the CPSIA provides that, as of August 14, 2009, children's products may not contain more than 300 parts per million (ppm) of lead. Section 102 of the CPSIA requires third party testing of certain children's products, and section 103 of the CPSIA requires tracking labels for children's products.

The statutory definition of "children's product" also specifies certain factors that are to be taken into consideration when making a determination about "whether a consumer product is primarily intended for a child 12 years of age or younger." These factors are:

- A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.

- Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.
- Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.
- The Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

B. Discussion of Comments to the Proposed

Interpretative Rule and Changes to the Final Interpretative Rule

In the *Federal Register* of April 20, 2010 (75 FR 20533), the Commission published a proposed interpretative rule to help interested parties understand how the Commission will determine whether a particular consumer product is a "children's product." By this rule, the Commission intends to clarify its interpretation of the statutory requirements and provide guidance on sections 101, 102, and 103 of the CPSIA with regard to children's products. The language in the preamble of this rule and the preamble of the proposed rule (75 FR at 20533) (to the extent the proposed rule was not altered by the final rule) may be consulted in determining its administrative

construction and meaning. The Commission recognizes that the determination of whether a product meets the definition of a children's product depends on factual information that may be unique to each product and, therefore, would need to be made on a case-by-case basis. Given the factual nature of the inquiry, this rule is intended to give interested parties a better understanding of our approach in evaluating children's products. This document does not impose any additional requirements beyond those in the CPSIA, but informs the public of the Commission's interpretation of the term "children's product." The proposed interpretative rule would create a new section in the CFR interpreting the definition of children's product and elaborating on the accompanying statutory factors.

The Commission notes that while all four factors are considered, certain elements of the factors are common to many children's products and cut across numerous product categories. These elements are decorations or embellishments with childish themes that invite use by a child 12 years of age or younger, sizing a product for a child, or marketing a product in a way designed to make it appeal primarily to children.

The Commission received numerous comments from individuals and groups, including consumers, consumer

organizations, manufacturers, trade associations, and testing laboratories. Several commenters supported the proposed rule; other commenters sought to clarify, expand, or limit the scope of the rule.

We initially proposed this section under Chapter II of Title 16, Part 1500 of the Federal Hazardous Substances Act ("FHSA"). However, because the definition of children's product amends section 3(a)(2) of the Consumer Product Safety Act ("CPSA"), on our own initiative, we have renumbered the final rule to become a new Part 1200, Definitions, under Subchapter B - Consumer Product Safety Act Regulations.

As a result of our decision to place the final rule in a new part 1200, we have, on our own initiative, created a new § 1200.1 to describe the purpose of the new part 1200. Section 1200.1 states that part 1200 is intended to provide guidance on the definition of children's product and the factors considered for making determinations regarding children's products as set forth under 15 U.S.C. 2052(a)(2). Additionally, proposed § 1500.92, "Definition of children's product," is now renumbered as § 1200.2 in the final interpretative rule.

We describe and respond to the comments in part B of this document and also describe the final rule. To make it

easier to identify comments and our responses, the word "Comment," in parentheses, will appear before the comment's description, and the word "Response," in parentheses, will appear before our response. We also have numbered each comment to help distinguish among different comments. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value, importance, or the order in which it was received.

1. *Definition of "Children's Product" - § 1200.2(a)(2) (Formerly § 1500.92(a)(1))*. Proposed § 1500.92(a) would provide that, under section 3(a)(2) of the CPSA, a children's product means a consumer product designed or intended primarily for children 12 years of age or younger. We interpreted the term "designed or intended primarily" to apply to those consumer products mainly for children 12 years old or younger. A determination of whether a product is a "children's product" will be based on consideration of the four specified statutory factors. In addition, because the statutory factors incorporate the concept of "use" by the child in some manner, proposed § 1500.92(a)(1) interpreted "for use" by children 12 years or younger generally to mean that children will physically interact with such products based on the reasonably foreseeable use and misuse of such products.

(Comment 1) - Several commenters state that the definition should be clear that children's products are only those designed or intended by the manufacturer to be primarily for children 12 years of age or younger and that a product falls outside the scope of the definition if the product was designed or intended primarily by the manufacturer for older children or adults. In addition, some commenters request that the Commission limit the scope of the definition by emphasizing that the manufacturer's intent is the key factor for evaluating whether a consumer product is a children's product. According to these commenters, the interpretative rule should make clear that the remaining statutory criteria would be subordinate to statements made by manufacturers about the intended age of the users.

(Response 1) - We disagree that a determination of what is a children's product should be based mainly on the manufacturer's intent. The statute provides that the definition of a "children's product" is a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, section 3(a)(2)(A) through (D) of the CPSA expressly mandates an analysis of four factors that "shall be considered": (1) a statement by the manufacturer about the intended use of the

product, including a label on such product if such statement is reasonable; (2) whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger; (3) whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and (4) the Age Determinations Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines. All of these factors will be considered in each case to the extent that they are applicable.

The manufacturer's statement of intent, including labeling, is only one of four factors that we must consider. While we agree that the manufacturer's statement of intent plays an important role in making initial children's product determinations, it is not necessarily determinative, or entitled to greater weight than any other factor. Courts have held that, as a general rule, when a statute requires an agency to consider a factor, the agency must reach "an express and considered conclusion" about the bearing of the factor, but need not give "any specific weight to the factor." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 516 (D.C. Cir. 1983) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978)). At a minimum, all the statutory factors must be

considered when determining whether a particular consumer product is considered to be intended primarily for children 12 years of age or younger, and we will not initially assign any more or less weight to any individual factor.

(Comment 2) - Other commenters state that the proposed definition of children's product should not contain a definition of "for use" by children that is based on "physical interaction" and "foreseeable use and misuse" of such products by children. According to the commenters, the requirement that children physically interact with such products would capture many household products that would not be designed or intended primarily for children 12 years of age or younger.

(Response 2) - We disagree that the interpretation of "for use" would capture general use products that are not primarily intended for use by children. We interpret "for use" generally to mean physical use of a product in order to distinguish products, such as diaper bags that are intended to be used *with* children by the parent or caregiver from products that are intended for use *by* children. Products that are for use by children generally are those with which they will interact or have direct physical contact, such as with the diaper itself. There also can be children's products where the interaction is

not direct physical contact, such as a mobile hung over an infant's crib, where the child's interaction with the mobile is to be entertained, soothed, or transitioned to sleep (to mention a few of the purposes stated in the advertisements for these products).

Contrary to the commenters' assertions, many household products are not primarily intended for use by children, but may be touched by children. Products that are considered general use products, such as televisions, stereo equipment, and appliances, do not become children's products simply because children may have contact with them because the products are not designed or intended primarily for use by children 12 years of age or younger.

When evaluating products, the Commission not only considers the manufacturer's statement of intended use, but the product's reasonably foreseeable use (i.e., what a child using the product may reasonably be expected to do with the product). The question of whether there will be reasonably foreseeable use of a product by a child is a determination that is made initially by the manufacturer. We agree that foreseeable misuse in this context may be difficult for a manufacturer to determine. An analysis of the foreseeable uses should be adequate to make the initial determination as to whether a product is a children's

product. We have revised the final rule to reflect these changes and advise readers to disregard the discussion of misuse in the preamble to the proposed rule (75 FR at 20535).

(Comment 3) - A few commenters state that the proposed interpretative rule affects other requirements previously established for toys and children's products. Specifically, the commenters give as an example board/table games, which were identified under the Age Determination Guidelines as being appropriate for children in the 6-year-old range. The commenters assert that the games would have to comply with ASTM F963 (a toy standard that is now a mandatory consumer product safety standard pursuant to section 106 of the CPSIA), applicable FHSA requirements under 16 CFR 1500.50 through 1500.53, lead in surface coatings under 16 CFR 1303, and phthalates requirements of the CPSIA. If the games are general use products, the commenters claim that such products would not be required to comply with the lead in substrate requirements, or the tracking label requirements, or the mandatory third party testing requirements under the CPSIA.

(Response 3) - We recognize that some board games could be treated differently under separate provisions of the CPSIA, the cited FHSA regulations, and ASTM F963. In most places,

however, the statutes and regulations can be read consistently. For example, to the extent that toys or other articles are subject to small parts testing because they are intended for use by children under 3 years of age, it is reasonable to conclude that they are children's products. Likewise, for toys and other articles intended for use by children under 8 years of age that are subject to the use and abuse tests at 16 CFR 1500.50 through 1500.53, and the sharp points and edges tests at 16 CFR 1500.48 through 1500.49, such products would also logically be considered children's products. We have added the following sentences to clarify this in the rule. The final interpretative rule now states in relevant part:

Toys and articles that are subject to the small parts regulations at 16 CFR Part 1501 and in ASTM F963, would logically fall within the definition of children's product since they are intended for children 12 years of age or younger. Toys and other articles intended for children up to 96 months (8 years old) that are subject to the requirements at 16 CFR 1500.48 through 1500.49 and 16 CFR 1500.50 through 1500.53 would similarly fall within the definition of children's product given their age grading for

these other regulations. Therefore, a manufacturer could reasonably conclude on the basis of the age grading for these other regulations that its product also must comply with all requirements applicable to children's products including, but not limited to, those under the Federal Hazardous Substances Act, ASTM F963, "Standard Consumer Safety Specification for Toy Safety," and the Consumer Product Safety Improvement Act of 2008.

We discuss children ages 9 through 12 in the comments and responses to proposed § 1500.92(c)(1) (now renumbered as § 1200.2(c)(1) in the final rule).

(Comment 4) - One commenter states that the definition of children's products should include pet foods. Another commenter states that adult absorbent care products should be distinguished from children's diapers.

(Response 4) - Pet foods and adult absorbent products are outside the scope of this interpretative rule because these products are regulated under the Federal Food, Drug, and Cosmetic Act ("FFDCA"). 21 U.S.C. § 201, et seq. Pet food falls within the definition of "food" at section 201(f) of the FFDCA, which defines "food," in part, as "articles used for food or drink for man or other animals."

As for diapers, although children's diapers are considered children's products, adult absorbent products are devices as defined at section 201(h) of the FFDCA, and the Food and Drug Administration classifies a "protective garment for incontinence" as a class I device (see 21 CFR 876.5920).

2. *Definition of "General Use Product" - § 1200.2(b)(1) (Formerly § 1500.92(b)(1))*. Proposed § 1500.92(b)(1) would define a general use product to mean a consumer product that is not designed or intended primarily for use by children 12 years old or younger. The proposal also would interpret a general use product as a consumer product "mainly for consumers older than age 12" and would explain that some products may be designed or intended for consumers of all ages, including children 12 years old or younger, but are intended mainly for consumers older than 12 years of age. The proposal would provide that, "[e]xamples of general use products may include products with which a child would not likely interact, or products with which consumers older than 12 would be as likely, or more likely to interact. Products used by children 12 years of age or younger that have a declining appeal for teenagers are likely to be considered children's products."

(Comment 5) - Several commenters would have us make explicit that, if a product is as likely or more likely to be used by a child older than 12 years of age than by a child 12 years of age or younger, the product may not be considered a children's product. Other commenters state that the terms "as likely" and "just as appealing" (which appeared in the preamble to the proposed rule and not in the codified text itself (see 75 FR at 20534)) to compare younger and older children adds subjectivity and uncertainty to the determination process. These commenters believe that, if a determination is not clear cut, the Commission should err in protecting child safety and health. In addition, the commenters state that products having intrinsic play value for young children should be considered children's products.

(Response 5) - A children's product is a consumer product designed or intended primarily for children 12 years of age or younger. General use products are those consumer products designed or intended primarily for consumers older than age 12. As we stated in the preamble to the proposed rule, "if an older child or adult is as likely, or more likely to interact with the [product] than a child, such a [product] would not be a product designed or intended primarily for children 12 years of age or younger, and thus, would not be considered a "children's product." See 75 FR at 20534. We will consider

all four of the statutory factors to determine if a product is primarily intended for children 12 years of age or younger, always keeping in mind that one of the Commission's most important mandates is to protect children's health and safety.

We disagree with the comment that any product that has intrinsic play value for young children would automatically be considered a children's product. Young children often find intrinsic play value in a number of general use products, such as pots and pans or keys, but they do not become children's products simply because children may play with them. The Commission has other statutory authorities to address nonchildren's products that may pose a risk to children.

3. *Other products specifically not intended for use by children 12 years of age or younger - § 1200.2(b)(2) (Formerly § 1500.92(b)(2)).* Proposed § 1500.92(b)(2) would state that products, such as cigarette lighters, candles, and fireworks, which the Commission has traditionally warned adults to keep away from children, are not subject to the CPSIA's lead limits, tracking label requirement, and third-party testing and certification provisions. Similarly, this section would provide that products that incorporate performance requirements for child resistance are not children's products because they are designed specifically to ensure that children cannot access the contents. This would include products such

as portable gasoline containers and special packaging under the Poison Prevention Packaging Act.

We did not receive any comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(b)(2), we have finalized this section without change.

4. *Factors Considered - § 1200.2(c)(Formerly § 1500.92(c))*. Proposed § 1500.92(c) would set forth the statutory factors that must be considered to determine whether a consumer product is primarily intended for a child 12 years of age or younger.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c), we have finalized this section with a nonsubstantive change.

5. *Manufacturer's Statement - § 1200.2(c)(1) (Formerly § 1500.92(c)(1))*. Proposed § 1500.92(c)(1) would explain that a manufacturer's statement about the product's intended use, including the product's labels, should be reasonably consistent with the expected use patterns for a product. This section also would provide that, "[a] manufacturer's statement that the product is not intended for children does not preclude a product from being regulated as a children's product if the primary appeal of the product is to children 12 years of age or younger.

Similarly, a label indicating that a product is for ages 10 and up does not necessarily make it a children's product if it is a general use product." The manufacturer's label, in and of itself, is not considered to be determinative.

(Comment 6) - One commenter would revise the interpretative rule to clarify the "gray" area of products designed or intended both for children 9 to 12 years old and for teenagers and older. The commenter states that the manufacturer's statement should refer to ages 9 and up, rather than ages 10 and up.

(Response 6) - We agree that the hardest questions regarding determinations on whether a product is primarily intended for children 12 years of age or younger will often involve this age group. For example, the requirements for the use and abuse test methods and for the sharp points and edges test methods discussed in part B.1 of this document and § 1200.2(a) do not extend past 96 months (8 years of age). The Age Determination Guidelines group 9 to 12-year-olds together because these older children have advanced cognitive and motor skills, as well as the ability to care for their belongings, compared to younger children. Thus, products in this category may have characteristics that are also appropriate for products intended for older children and adults. A number of products intended for this age group (9 and up, 10 and up, 11

and up, and 12 and up) will require further evaluation. However, we have revised the final rule to include ages 9 and up, rather than ages 10 and up to reflect the age groups discussed in the Age Determination Guidelines. The sentences now state, "Similarly, a label indicating that a product is for ages 9 and up does not necessarily make it a children's product if it is a general use product. Such a label may recommend 9 years old as the earliest age for a prospective user, but may or may not indicate the age for which the product is primarily intended."

6. *Packaging, Display, Promotion or Advertising - § 1200.2(c)(2) (Formerly § 1500.92(c)(2))*. Proposed § 1500.92(c)(2) would restate the statutory factor on whether a product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(2), we have finalized this section without change.

7. *Express or Implied Representations - § 1200.2(c)(2)(i) (Formerly § 1500.92(c)(2)(i))*. Proposed § 1500.92(c)(2)(i) would explain that, for example, advertising that expressly declares that the product is

intended for children 12 years of age or younger will support a determination that a product is a children's product. While, for example, advertising showing children 12 years of age or younger using the product may support a determination that the product is a children's product. The proposal would state that such representations may be found in packaging, text, illustrations and/or photographs depicting consumers using the product, instructions, assembly manuals, or advertising media used to market the product.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(2)(i), we have finalized this section without change.

8. *Product's Physical Location- § 1200.2 (c)(2)(ii)* (Formerly § 1500.92(c)(2)(ii)). Proposed § 1500.92(c)(2)(ii) would state that the product's physical location near, or visual association with, children's products may be a factor in making an age determination, but is not determinative.

(Comment 7) - One commenter states that if a store decides to place a youth basketball in a toy shop section, instead of the teen and adult sporting goods section, it does

not make it less of a basketball, and the location should not be determinative in the analysis.

(Response 7) - We agree that a product's location, while important, is not determinative. The physical placement of a product in a store may not be known by the manufacturer when an age determination is made, and manufacturers may not have any control over the placement of their products. However, if such marketing information is known, it should be considered in the determination analysis because the physical location of a product in a store is part of the product's marketing. In addition, the Commission may consider the kind of stores to which a product is distributed in determining whether it is designed or primarily intended for children 12 years of age or younger.

(Comment 8) - One commenter states that the packaging, marketing, and placement in a retail store should be the main indication that the product is targeting children 12 years of age and under. The commenter asserts that the interaction between this factor and the others should be clearly stated.

(Response 8) - While the packaging, marketing, and store placement will be considered, these factors do not necessarily outweigh the other factors that may need to be considered in making an age determination. We will weigh all of the

relevant factors. Therefore, other than renumbering the provision to be § 1200.2(c)(2)(ii), we have finalized this section with nonsubstantive changes.

9. *Marketing with Other Products - § 1200.2(c)(2)(iii)(Formerly § 1500.92(c)(2)(iii))*. Proposed § 1500.92(c)(2)(iii) would state that the product's association or marketing in conjunction with nonchildren's products may not be determinative as to whether the product is a children's product. For example, packaging and selling a stuffed animal with a candle would not preclude a determination that the stuffed animal is a children's product since stuffed animals are commonly recognized as being primarily intended for children.

(Comment 9) - One commenter states that stuffed animals sold with adult products should be considered general use items since the manufacturer intended the product for distribution to adults.

(Response 9) - We disagree with the commenter. Packaging of toys or other articles appropriate for children along with adult products occurs occasionally. Therefore, we will not assume that all products in a copackaged product are general use products if the copackaged product contains toys or other articles that are appealing to and more likely to be used by children.

Therefore, other than renumbering the provision to be § 1200.2(c)(2)(iii), we have finalized this section without change.

10. *Commonly Recognized by Consumers - § 1200.2(c)(3) (Formerly § 1500.92(c)(3))*. Proposed § 1500.92(c)(3) would state that the consumer perception of the product's use by children, including its reasonably foreseeable use and misuse, will be evaluated. In addition, the proposed interpretative rule would state that sales data, market analyses, focus group testing, and other marketing studies may help support an analysis regarding this factor.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3), and removing the reference to "misuse" for the same reasons as discussed in Response 2, we have finalized this section without change.

11. *Additional Features and Characteristics of Children's Products - § 1200.2(c)(3)(i) (Formerly § 1500.92(c)(3)(i))*. Proposed § 1500.92(c)(3)(i) would list additional considerations that may help distinguish children's products from nonchildren's products. For example, the proposed rule would include considerations such as small sizes that would not be comfortable for the average adult, exaggerated features (large buttons, bright

indicators) that simplify the product's use, safety features that are not found on similar products intended for adults, colors commonly associated with childhood (pinks, blues, bright primary colors), decorative motifs commonly associated with childhood (such as animals, insects, small vehicles, alphabets, dolls, clowns, and puppets); and features that do not enhance the product's utility (such as cartoons), but contribute to its attractiveness to children 12 years of age or younger.

We did not receive any specific comment requesting modification of this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(i), we have finalized this section without change.

12. *Principal Use of Product - § 1200.2(c)(3)(ii)* (Formerly § 1500.92(c)(3)(ii)). Proposed § 1500.92(c)(3)(ii) would state that a product's principal use may help consumers distinguish children's products from nonchildren's products. The proposed interpretative rule would explain that just because an item could be used as a children's product, such as when a child pretends that a broom is a horse, that does not mean the item is a children's product because the broom's principal use is for sweeping.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(ii), and rephrasing the provision for clarity, we have finalized this section without change.

13. *Cost - § 1200.2(c)(3)(iii). (Formerly § 1500.92(c)(3)(iii)).* Proposed § 1500.92(c)(3)(iii) would state that the cost of a given product may influence consumer perception regarding the age of intended users.

(Comment 10) - A few commenters state that cost should not be a factor because many products, such as craft products and Halloween products, are low cost, and that this factor does not correlate with whether the products are more likely to be given to children. Another commenter states that we should clarify the consideration of "cost" in determining what is a children's product and include representative monetary frameworks for some categories.

(Response 10) - Although the cost of a product, by itself, is not determinative, the cost of an item can be a consideration. As stated in the preamble of the proposed rule:

A product's cost may also be considered in evaluating whether a consumer product is primarily intended for use by a child or an adult. The cost of a given product may influence

the determination of the age of intended users. Very expensive items are less likely to be given to children 12 years of age or younger, depending on the product. We have not identified a price point where any given product achieves automatic adult status but, in general terms, within a given product category (like models or remote controlled vehicles), products intended for adults cost more than products intended for children because children are often less careful with their belongings than adults and therefore are more likely to be entrusted with less expensive models. See 75 FR 20536 (April 20, 2010).

Given the variety of products in the marketplace, we cannot provide monetary frameworks for categories of products and must evaluate products on a case-by-case basis. Therefore, other than renumbering the provision to be § 1200.2(c)(3)(iii), we have finalized this section without change.

14. *Children's Interactions* - § 1200.2(c)(3)(iv) (Formerly § 1500.92(c)(3)(iv)). Proposed § 1500.92(c)(3)(iv) would explain that products for use in a child's environment by the caregiver, but not for use by

the child, would not be considered primarily intended for a child 12 years of age or younger.

(Comment 11) - One commenter disagrees with the Commission's analysis of a child's interaction with certain items discussed under furniture and fixtures and the interaction's effect on whether or not a product was a children's product. The commenter notes that the Commission stated in the proposed rule that "a humidifier may be used in a child's room, but this does not make it for children to use; instead, adult caregivers use the humidifier to modify the air in a child's room." While agreeing that an ordinary household humidifier is a general use product, the commenter states that a humidifier that is composed of colored plastic and shaped like a baby animal with a smile on its face is not equally likely to be purchased for and used by adults and children; the humidifier is designed to appeal primarily to young children and used in a young child's room. The commenter notes that the child's use of the product is indirect in that the child uses it by benefitting from the steam it emits. The commenter also questions the Commission's interpretation of "interaction" in the example of a lamp that has a childish theme (for example, a nonmovable fire truck with a Dalmatian) but does not have "play value" or

features that add play value or other features that would invite physical interaction with the lamp beyond turning it on or off. The commenter believes such childish embellishments are expressly designed to appeal primarily to children and to be used in a child's room, not in that of an adult.

(Response 11) - We agree that products that are designed or intended primarily for children 12 years of age or younger would be considered children's products and that the child's interaction with the product does not have to be physical, although that is generally the case. We noted earlier the example of the crib mobile, where the interaction is not direct physical contact, but where the child's interaction with the mobile is to be entertained, soothed, or transitioned to sleep (to mention a few of the purposes stated in the advertisements for these products). Whether these products are children's products will be determined by an evaluation of all the factors listed in the statute, just as with any other product. Adult lamps or ordinary household humidifiers that are placed in any room of a home would be considered general use products. The ability or inability of a young child to turn a lamp (or other product) on or off would not determine whether or not it is a children's product. Attempting to make a

distinction as to whether a product is intended for children 12 years of age or younger, based on some age under thirteen at which the interaction may change to direct physical interaction with a product creates artificial age distinctions that are not supported by the statutory language. This represents a change from the proposed rule, and any language in the preamble to the contrary should be disregarded, and the final rule is revised to reflect this change.

A home furnishing product that is embellished or decorated in a manner that is appealing to children 12 years of age or younger and is marketed to be placed in the rooms of such children could be considered a children's product. Such embellishment would not be considered in isolation, however. Features that invite or entice the child to use the product, or invite physical interaction, would support such a determination along with how the product is marketed and advertised and any manufacturer's statement of intended use.

15. *The Age Determination Guidelines - § 1200.2(c)(4) (Formerly § 1500.92(c)(4))*. Proposed § 1500.92(c)(4) would quote the statutory factor at section 3(a)(2)(D) of the CPSA regarding the Age Determination Guidelines ("Guidelines") issued by the Consumer Product Safety

Commission staff in September 2002 and any successor to such guidelines. The proposal also would explain that a product's appeal to different age groups and the capabilities of those age groups may be considered when making determinations about the appropriate user groups for products.

(Comment 12) - A few commenters state that the Guidelines are only intended to evaluate the play value of toys and should not be expanded to evaluate whether children of certain ages can successfully perform specific tasks if the product or type of product is not specifically mentioned by the Guidelines.

(Response 12) - We disagree with the commenters. Congress has mandated that the Age Determination Guidelines be one of the four statutory factors considered in determining whether a product is intended primarily for children. The Guidelines generally describe the factors that appeal to children and the activities that they can perform across childhood and can be used in making an age determination of any product, whether it is a toy or other article intended for use by children. The Guidelines provide information about social, emotional, cognitive, and physical developments during childhood. That information

applies to many products not actually mentioned by name in the Guidelines.

16. *Examples - § 1200.2(d) (Formerly § 1500.92(d)).*

Proposed § 1500.92(d) would provide examples to help manufacturers understand what types of products would constitute a children's product under the CPSA.

We did not receive any specific comment on this provision. Therefore, other than renumbering the provision to be § 1200.2(d), we have finalized this section without change.

17. *Furnishings and Fixtures - § 1200.2(d)(1)*

(Formerly § 1500.92(d)(1)). Proposed § 1500.92(d)(1) would give examples of general home furnishings and fixtures (such as ceiling fans, humidifiers, and air purifiers) that often are found in children's rooms or schools, but would not be considered children's products unless they are decorated or embellished with a childish theme, have play value, and/or are sized for a child. The proposal also would give examples of home or school furnishings that are primarily intended for use by children and considered children's products, such as infant tubs, bath seats, and child-sized chairs. We also stated that decorative items, such as holiday decorations and household seasonal items that are intended only for display and with which children

are not likely to interact, are generally not considered children's products because they are intended to be used by adults.

(Comment 13) - One commenter states that hooks should be considered general use products, whether or not they are embellished with a children's theme.

(Response 13) - Any home furnishing or fixture that is decorated or embellished with a childish theme and invites use of the product by the child, is sized for a child, or is marketed to appeal primarily to a child, could be found to be a children's product designed or intended primarily for children 12 years of age or younger, such as, for example, clothing hooks embellished with a childish theme to make them appear to be pirate's hooks. As we noted in the preamble to the proposed rule, unembellished clothing hooks would be considered general use products, unless a manufacturer attaches the hook to a children's product, such as a child-sized desk (thereby making it clear the hook is intended to be used primarily by a child) in which case that hook would be considered a children's product.

(Comment 14) - One commenter seeks clarification on the factors on furniture and collections of furniture that are suitable for children from birth through college. According to the commenter, manufacturers use various terms

that are confusing, including "juvenile" and "youth" furniture. In addition, the commenter requests an ability to obtain informal and quick opinions from the Commission staff, to make such opinions publicly available on the web, and to create a mechanism for resolving disputes.

(Response 14) - The manufacturer is in the best position to initially determine whether a "collection" of furniture is designed or intended primarily for children 12 years of age or younger. However, to the extent that children 12 years of age or younger will be using such furniture from birth or toddler age through their teenage years, we consider such furniture to be children's products because children will be interacting with such furniture throughout their childhood. These items are likely to be sized for small children and may have other characteristics, such as bright colors or embellishments that would be appealing to children. Although, such products may come with extension kits or other modifications to make them more appropriate for older children, the furniture is intended primarily for use by young children who may also use such furnishings later as they become older. To provide guidance regarding determinations that have been made by Commission staff, as appropriate, we will post on our website,

<http://www.cpsc.gov>, some products that have been determined to be either children's products or general use products, subject to our public disclosure of information requirements under 15 U.S.C. 2055, CPSC regulations at 16 CFR part 1101, and the availability of CPSC resources.

(Comment 15) - One commenter requests that general home furnishings include carpets and rugs as examples.

(Response 15) - To provide additional clarity to this section, the final rule includes carpets and rugs in the examples of general home furnishings and fixtures.

Generally, home furnishings and fixtures would not be considered children's products unless they are decorated or embellished with childish themes and invite use by a child 12 years of age or younger, are sized for a child, or are marketed to appeal primarily to children. In the case of rugs and carpets, the particular color or size of a rug or carpet, considered alone, would not be sufficient to make a determination that a rug or carpet is a children's product.

(Comment 16) - Another commenter requests that general home furnishings include holiday decorations, regardless of theme, because such products are for display only and are not intended to be children's products. One commenter also states that not all Halloween products should be considered children's products.

(Response 16) - We agree, in part, and disagree, in part, with the commenters. We agree that most holiday decorations, including seasonal decorations, are not children's products, even though they may appeal to children. However, certain products such as Halloween costumes, that are considered toys and sold and marketed in toy stores, would continue to be considered children's products if intended primarily for children 12 years of age or younger.

18. *Collectibles* - § 1200.2(d)(2) (Formerly § 1500.92(d)(2)). Proposed § 1500.92(d)(2) would distinguish adult collectibles from children's collectibles based on themes that are inappropriate for children 12 years of age or younger; features that preclude use by children during play, such as high cost, limited production, and display features (such as hooks or pedestals); and whether such items are marketed alongside children's products.

(Comment 17) - A few commenters request that model trains be specifically included in the definition of general use products. The commenters state that the average age of a model railroader is 53 years old and that there is a level of sophistication required to operate the locomotives. Additionally, the commenters note that model trains may be costly, with prices from \$50 up to \$1,575.

(Response 17) - We agree that certain model railroads and trains are not children's products given the large number of adult model railroad hobbyists, the costs involved, and the level of sophistication required to operate them. Model trains and model train accessories (such as scenery, scale buildings, and supplies), are made by model railway manufacturers who sell their trains at model train shops and model train hobby stores. Children's train sets may have childish themes and may be easier for a child to assemble and use. By contrast, model railroad hobbyists collect trains, build miniature landscapes for the trains, or even operate their own miniature railroads outdoors. Accordingly, the final rule adds "model railways and trains made for hobbyists" to the list of examples of "collectible" items that would be considered general use products.

(Comment 18) - One commenter asks that we add fragility of the materials as a consideration in determining collectibles. The commenter also requests a registry of collectibles or online listing to provide clear guidance.

(Response 18) - We stated in our example in proposed § 1500.92(d)(2) that collectible plush bears are those which have high cost, are highly detailed, with fragile

accessories, display cases, and platforms. We believe that fragility of the materials may also be considered when assessing a collectible because children are less likely to be given items that can break. Accordingly, we have revised this section to include "fragile features" as a characteristic to help distinguish collectibles from children's products. The first sentence in this section now states, "Adult collectibles may be distinguished from children's collectibles by themes that are inappropriate for children 12 years of age or younger, have features that preclude use by children during play, such as high cost, limited production, fragile features, display features (such as hooks or pedestals), and are not marketed alongside children's products (for example, in a children's department) in ways that make them indistinguishable from children's products."

As for the commenter's request regarding a registry of collectibles or online listing, as appropriate, we will post on our website, <http://www.cpsc.gov>, some products that have been determined to be either children's products or general use products by Commission staff, subject to our public disclosure of information requirements under 15 U.S.C. 2055, CPSC regulations at 16 CFR part 1101, and the availability of CPSC resources.

(Comment 19) - One commenter disputes the implication that collectibles must be of high cost or uniquely marked. The commenter asserts that labeling products "Not a toy" or "Not for use by children 12 and under" would be important elements in identifying such products as intended for adults.

(Response 19) - We agree that not all collectibles are high cost. High cost is simply one among several considerations we will evaluate when making a determination. Generally, many collectibles are of higher cost and/or marked to distinguish such products from similar children's products. The cost of an item, while not determinative, can be an important consideration in analyzing collectibles because very expensive collectibles are less likely to be given to children who may accidentally destroy them. In addition, as discussed in part B.5 of this document, the statement by a manufacturer about the intended use of a product, including a label on such product, will be considered in making any age determination.

19. *Jewelry - § 1200.2(d)(3) (Formerly § 1500.92(d)(3)).* Proposed § 1500.92(d)(3) would provide characteristics for distinguishing children's jewelry from adult jewelry. For example, the proposed interpretative

rule would explain that jewelry intended for children is generally sized, themed, and marketed to children and that characteristics such as size, very low cost, play value, childish themes on the jewelry, and sale with children's products may suggest that the jewelry is a children's product. The proposed interpretative rule also would explain that many aspects of an item's design and marketing are considered when determining the age of consumers for whom the product is intended and will be purchased. The proposed interpretative rule listed, as aspects of the item's design and marketing the following factors: advertising; promotional materials; packaging graphics and text; size; dexterity requirements for wearing; appearance (coloring, textures, materials, design themes, licensing, level of realism); and cost.

(Comment 20) - One commenter disputes the considerations that are used in distinguishing adult jewelry from children's jewelry, including considerations such as dexterity requirements and play value. In addition, this commenter states that the proposed interpretative rule failed to include design drawings, brand plans, and compliance with standards for adult jewelry as considerations of a manufacturer's intent in developing a product. The commenter asserts that the

proposed interpretative rule improperly expands the application of the Age Determination Guidelines to products other than toys.

(Response 20) - We disagree that we place an undue emphasis on dexterity or play value when making age determinations. Dexterity requirements may be useful for making distinctions between children's and adult jewelry. While some elastic bracelets may be useful to people suffering from arthritis, delicate clasps are difficult for younger children to use, which would indicate that such jewelry may be intended for older consumers. While jewelry is not considered a toy, some jewelry can have play value. The most common type of play associated with children's jewelry is role playing. However, although some general use products may have intrinsic play value, they do not become children's products based on that characteristic alone. Play value and dexterity are only two of the characteristics that are examined in making age determinations for jewelry.

Regarding the commenter's criticism that the proposed rule did not include design drawings, brand plans, and compliance with adult jewelry standards, the proposed interpretative rule specifically indicated that many aspects of an item's design and marketing are considered

when determining the age of consumers for whom the jewelry is intended and by whom it will be purchased. The commenter states that design drawings and brand plans should be relevant considerations in making an age determination. We agree that such information is relevant to consider when available for review. Moreover, the manufacturer's intent in designing, branding, or developing a product is applicable to the factor regarding the statement by the manufacturer about the intended use of the product. This could include the manufacturer's compliance with state standards for adult jewelry. As discussed in § 1200.2(a)(1), the manufacturer's statement is only one of four statutory factors considered in making a determination.

Additionally, the Commission recognizes that the determination of whether a product is a children's product is based on whether it is designed or intended primarily for children 12 years of age or younger and not the frequency of such a product's appeal to adults. We have made this change to the rule to reflect this recognition.

We disagree that we improperly expanded the Age Determination Guidelines (2002) to cover products other than toys. The Guidelines are among the factors that must be considered when making determinations. The descriptions

of factors that appeal to children and the activities that they can perform across childhood are described generally in the Guidelines for use in age determinations of any product, whether it is a toy or other article intended for children. The Guidelines provide information about social, emotional, cognitive, and physical developments during childhood that are applicable to many products that are not specifically named in the Guidelines.

20. *DVDs, Video Games, and Computer Products* - § 1200.2(d)(4) (Formerly § 1500.92(d)(4)). Proposed § 1500.92(d)(4) would consider most computer products and electronic media devices, such as CDs, DVDs, and DVD players, to be general use products. However, the proposal also would explain that some CDs and DVDs may have encoded content that is intended for and marketed to children, such as children's movies, games, or educational software. The proposed interpretative rule would explain that CPSC staff may consider ratings given by entertainment industries and software rating systems when making an age determination. The proposed interpretative rule would note that, among the CDs and DVDs that have content embedded that is intended for children, certain CDs and DVDs that contain content for very young children would not be handled or otherwise touched by children because they do not have the motor

skills to operate media players and because such products, by themselves, do not have any appeal to children. Accordingly, the proposed interpretative rule would indicate that these types of CDs or DVDs would not be considered children's products because they are not used "by" children and children do not physically interact with such products. The proposed interpretative rule would say that CDs or DVDs and other digital media that may be handled by older children could be considered children's products if such movies, video games, or music were specifically aimed at and marketed to children 12 years of age or younger and have no appeal to older audiences.

(Comment 21) - Several commenters assert that an approach distinguishing CDs and DVDs for very young children who lack the motor skills to operate CDs and DVDs, from CDs and DVDs for older children who have such motor skills is a false distinction. These commenters state that a very young child is not allowed to handle a CD or DVD unless he or she learns to insert it properly into a CD or DVD player. The commenters claim that a child will interact much more with the CD or DVD player than he or she will interact with the CD or DVD itself. A commenter also states that the Commission's proposed guidelines regarding CDs provide no clear mechanism for manufacturers and

distributors to interpret or implement the definition; that children's music is not marketed like toys as "age 3+" or "suitable for under 3"; and any such distinctions in children's music would be entirely arbitrary and meaningless. Another commenter found the DVD discussion to be confusing and thought it would be difficult to implement. The commenter suggested eliminating the distinction between products intended for nursery- aged children and those intended for the next age group and thought we should just consider all of those DVDs to be children's products. The commenter also said it would be easier to base the age determinations on the already established ratings systems.

(Response 21) - Upon further consideration, we agree that attempting to make a distinction about whether a CD or a DVD is a children's product based upon whether the intended audience for a CD or DVD is an infant or a slightly older child only further complicates the age determination. With respect to the CDs and DVDs, consistent with an analysis of other products, we must consider the four statutory factors to assess these products. CDs and DVDs could be considered children's products if such movies, video games, or music were specifically created for and marketed to children 12 years

of age or younger and have little or no appeal to older audiences. The ratings and targeted age suitability given to the product will be considered when making an age determination. This represents a change from the proposed rule, and any language in the preamble to the contrary should be disregarded, and the final rule is modified to reflect this change.

It should be noted that the final rule also states that some media players or devices that play electronic content, if embellished or decorated with childish themes, sized for children, or marketed to appeal primarily to children, could be considered children's products because children 12 years of age or younger likely would be the main users of such items, and older children and adults would be unlikely to use such products.

(Comment 22) - One commenter sought clarification on how this section would affect the existing process for video game research and rating procedures regarding age. Another commenter states that the existing rating systems should be used to determine whether the product is intended for children aged 12 years and under.

(Response 22) - We do not expect that our definition of what is or is not a children's product to affect the research of products under development on children's

electronic media. The definition would not affect existing rating mechanisms, which fall under the authority of the Federal Communications Commission. Video game rating systems would be considered by staff as one indicator of age range for purposes of age grading.

(Comment 23) - Other commenters ask that we add more products to a general use category, including game consoles, book readers, digital media players, cell phones, and digital assistant communication devices sized for use by adults, irrespective of any childish decorations, to avoid any confusion. Some commenters also seek clarification that an accessory to an electronic children's product (i.e., transformers, cables, and connectors) is not itself a children's product if it is not for use by children but is, instead, likely to be used by parents or guardians. One commenter states that DVDs are exempt from the small parts requirement under ASTM F963-08. Accordingly, this commenter seeks clarity on how children's DVDs would be treated.

(Response 23) - We believe that most of these product categories, including game consoles, book readers, digital media players, cell phones, and digital assistant communication devices, power adapters, data cords, and other accessories to such devices, that are intended for

older children and adults, fall in the general use category. Accordingly, the final rule adds them as examples to the list of general use items, along with CD and DVD players. As noted earlier, the final rule also states that some media players or devices that play electronic content, if embellished or decorated with childish themes, sized for children, or marketed to appeal primarily to children, could be considered children's products because children 12 years of age or younger likely would be the main users of such items, and older children and adults would be unlikely to use such products.

The exemption from small parts for DVDs has no bearing on age determinations for DVDs made for children 12 years of age or younger. The small parts limitations are only applicable to toys for children younger than 3 years of age.

21. *Art Materials - § 1200.2(d)(5)(Formerly § 1500.92(d)(5))*. Proposed § 1500.92(d)(5) would consider art materials sized, decorated, and marketed to children 12 years of age or younger, such as crayons, finger paints, and modeling dough, to be children's products. The proposed interpretative rule would explain that crafting kits and supplies that are not specifically marketed to children 12 years of age or younger likely would be

considered products intended for general use, but that the marketing and labeling of raw materials (such as modeling clay, paint, and paint brushes) may often be given high priority for these art materials because the appeal and utility of these raw materials has such a wide audience.

(Comment 24) - One commenter states that the emphasis on marketing will lead to confusion because many art tools are small and may also be used by an adult. The commenter states that a more compelling and logical framework is to consider the circumstances under which a child will be using the product. The commenter asserts that, if the product has an instructional purpose which will be under the supervision of an adult, such products should be considered general use products, including child-sized craft tools, child-sized musical instruments, child-sized saddles and equestrian equipment, and classroom science kits.

(Response 24) - Size, marketing, and other factors will be considered when making age determinations. If a distributor or retailer sells or rents a general use product in bulk (such as a raw art materials or art tools) through distribution channels that target children 12 years of age or younger in educational settings, such as schools, summer camps, or child care facilities, this type of a

distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes, labeling, or instructions that the product is designed or intended primarily for children 12 years of age or younger, then it may be considered a children's product if the required consideration of all four statutory factors supports that determination.

The level of expected adult supervision needed for a product is not generally useful when making a children's product determination. If the product otherwise meets the definition of "children's product," the amount of supervision over the child's use of a children's product will not transform a children's product into a general use product. Accordingly, products such as small-sized craft tools, small-sized musical instruments, and small-sized saddles and equestrian equipment would be assessed on a case-by-case basis to determine whether such products are, in fact, children's products. We do note, however, that if the sizing of the product indicates that children 12 years of age or younger would be more likely to use such products than older children or adults, the product would likely

fall under the children's product category, rather than the general use category.

The Commission, on its own initiative, is adding the words "art tools" to the final rule to better describe those materials, such as paint brushes, which may have a wide audience due to their appeal and utility and is adding a fuller explanation of distribution strategies that might target settings such as schools.

As for classroom science kits, we address such products in part B.23 of this document and its discussion of § 1200.2(d)(7).

(Comment 25) - One commenter states that duplicative third party testing under the CPSIA should not be required for products that are covered under the Labeling of Hazardous Art Materials Act (LHAMA). Accordingly, this commenter requests that LHAMA be included as a FHSA labeling law in addition to the guidance that most art materials are general use products.

(Response 25) - We disagree with the comment because we do not believe that LHAMA duplicates testing required under the CPSIA. LHAMA requires that the manufacturer, importer, or repackager of art materials have their product's formulation reviewed by a toxicologist for its potential to cause chronic adverse health effects. A

conformance statement on the product is used to certify that the product has been so reviewed. However, the CPSIA introduces additional test requirements beyond what is required under LHAMA.

As for the commenter's request that we include LHAMA as a labeling requirement under the Federal Hazardous Substances Act (FHSA), LHAMA does not contain a performance standard similar to those in consumer product safety rules but rather requires labeling in the form of a conformance statement that the product formulation has been reviewed by a toxicologist. The requirements of LHAMA are similar to the labeling requirements of the FHSA, of which it is a part. Therefore, third party testing to LHAMA is not required. An art material designed or intended primarily for children 12 years of age or younger would have to be tested by a third party laboratory to demonstrate compliance with CPSIA, but it would not require third party testing and certification to the LHAMA requirements. For the same reasons, no general conformity certificate is required for general use art materials.

22. *Books - § 1200.2(d)(6) (Formerly § 1500.92(d)(6))*. Proposed § 1500.92(d)(6) would state that the content of a book can determine its intended audience. The proposed interpretative rule would explain that children's books

have themes, vocabularies, illustrations, and covers that match the interests and cognitive capabilities of children 12 years of age or younger. The proposal also would explain that the age guidelines provided by librarians, education professionals, and publishers may be dispositive for determining the intended audience. Furthermore, some children's books have a wide appeal to the general public, and in those instances, further analysis may be necessary to assess who the primary intended audience is based on consideration of relevant additional factors, such as product design, packaging, marketing, and sales data.

(Comment 26) - One commenter asks us to clarify whether children's magazines are covered by the CPSIA. Another commenter states that sales data should not be considered for books since adults purchase books for children.

(Response 26) - Children's magazines are evaluated using the same principles as those that apply to children's books in the interpretative rule. If intended primarily for children 12 years of age or younger, magazines must comply with the CPSIA requirements for children's products. We only consider sales data to be relevant to the extent that it reveals where the products are sold, such as in a children's book or toy store.

23. *Science Equipment - § 1200.2(d)(7) (Formerly § 1500.92(d)(7))*. Proposed § 1500.92(d)(7) would consider microscopes, telescopes, and other scientific equipment that would be used by an adult, as well as a child, to be general use products. The proposed interpretative rule would explain that equipment with a marketing strategy that targets schools, such as scientific instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the equipment is leased, rented, or sold. However, the proposal would further explain that, in general, scientific equipment that is specifically sized for children and/or has childish themes or decorations intended to attract children is considered a children's product. Toy versions of such items are also considered children's products.

(Comment 27) - Several commenters state that school supplies, such as science equipment, writing devices, and musical instruments used in educational settings, should be considered general use items. They argue that many items that are specified in these curriculums can be easily found at department stores, hardware stores, grocery stores, and specialty shops. In addition, other commenters state that many science and math programs and kits are principally designed and used as instructional materials for teachers

in a classroom setting. Accordingly, they request that we revise the rule to include such items as general use items when marketed and sold for the purpose of supervised, hands-on educational instruction. In addition, a few commenters request that pens, pencils, and other office supplies be specifically included as general use items because they are used mainly by the general public.

(Response 27) - We agree with the commenters that many math and science kits that are sent to schools for the purpose of teaching these subjects contain materials, such as rubber bands, staples, paper clips, and other items, that can be found in any hardware or grocery store. In determining whether these assembled products should now be considered children's products because of their new use, packaging, and marketing to schools, we consider the four specified statutory factors together as a whole. If a distributor or retailer sells or rents a general use product in bulk through distribution channels that target children 12 years of age or younger in educational settings, such as schools or summer camps, this type of a distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes,

labeling, or instructions that the product is designed or intended primarily for children 12 years of age or younger, then it may be considered a children's product if the required consideration of all four statutory factors supports that determination. Products mainly intended for use by the instructor would not be considered children's products.

Some pens and pencils are designed or intended primarily for children 12 years of age or younger. However, if a pen, pencil, or other office supply is not designed or intended primarily for children 12 years of age or younger, it would not be considered a children's product.

The Commission notes that, in the context of science equipment, size may be more pertinent to protective gear, such as gloves and aprons, in making an age determination than it would be to the scientific instruments themselves and is, on its own initiative, changing the final rule to reflect this.

24. *Sporting Goods and Recreational Equipment* - § 1200.2(d)(8) (Formerly § 1500.92(d)(8)). Proposed § 1500.92(d)(8) would consider sporting goods that are primarily intended for consumers older than 12 years of age to be general use items. The proposed interpretative rule

would explain that regulation-sized sporting equipment, such as basketballs, baseballs, bats, racquets, and hockey pucks, are general use items even though some children 12 years of age or younger will use them. However, this section would provide that sporting goods become children's products when they are sized to fit children or are otherwise decorated with childish features that are intended to attract children 12 years of age or younger. Likewise, this section would provide that recreational equipment, such as roller blades, skateboards, bicycles, camping gear, and fitness equipment, are considered general use products unless they are sized to fit children 12 years of age or younger and/or are decorated with childish features by the manufacturer.

(Comment 28) - Several commenters state that sporting equipment intended for "tweens," teens, and young adults should not be considered "children's products." One commenter states that "legitimate" sporting goods should be general use products whether they are used by a 9-year-old or 13-year-old and that "size" is irrelevant to making the determination. The commenter asserts that their uses and essential purposes are no different than sporting equipment used by teens. Another commenter states that the cost of

testing these products was too high and resulted in delays in manufacturing.

(Response 28) - We agree that products sized for general use are not converted into children's products because they are also used by children 12 years of age or younger (such as "tweens" whom, based upon the Age Determination Guidelines issued by the Consumer Product Safety Commission staff in September 2002, for purposes of this response, we consider to be individuals under 13, but not younger than 9 years of age). Unless such items are specifically marketed to children or have extra features that make them more suitable for children than for adults, they would be considered general use products. However, we disagree that sizing of the sporting equipment would be irrelevant to the age determination. If children 12 years or younger would mainly use the product because it would be too small or inappropriate for older children to use, then it likely would be considered a children's product.

As for the comment regarding testing costs and manufacturing delays, such matters are outside the scope of this rulemaking. Comments related to testing and certification are addressed in separate rulemaking on product certification published in the *Federal Register* on May 20, 2010 (75 FR 28336). Additionally, the Commission

recognizes that the use of the term "regulation sized sporting equipment" leaves room for confusion between whether the Commission is referring to youth regulation size or adult regulation size. Accordingly, the final rule is modified to reflect this consideration and renumbered as § 1200.2(d)(8).

(Comment 29) - One commenter states that the interpretative rule should be clear that a product sized for an adult, such as a baseball glove, is considered a general use product even if there is a cartoon character on it. In addition, the commenter asserts that a wading pool may be a children's product based on size alone, regardless of whether it contains additional play features, and requests a definition for "shallow" in reference to wading pool depth.

(Response 29) - We agree that the presence of a cartoon character on an adult-sized product is not sufficient to label a product as a children's product. Age determinations take into account the principal use patterns of a given product; so if a baseball glove is too large for children to use, it would not be intended for use by children 12 years of age or younger and therefore would not be a children's product, no matter how it is decorated.

In response to the comment regarding wading pools, we agree that such pools generally are intended for children even without childish themes or play features. The size, decorations, and depth of a pool may be sufficient to determine that a product is primarily intended for use by children. However, the Commission does not have regulations setting forth the dimensions of wading pools.

25. *Musical Instruments* - § 1200.2(D)(9) (Formerly § 1500.92(d)(9)). Proposed § 1500.92(d)(9) would consider musical instruments suited for an adult musician as well as a child to be general use products. Instruments primarily intended for children can be distinguished from adult instruments by their size and marketing themes. The proposed interpretative rule also would explain that products with a marketing strategy that targets schools, such as instrument rentals, would not convert such products into children's products if such products are intended for general use, regardless of how the instruments are leased, rented, or sold. These instruments are intended by the manufacturer for use primarily by adults, although there also may be incidental use by children through such programs. However, this section also would provide that products that produce music or sounds in a manner that simplifies the process so that children can pretend to play

an instrument are considered toys primarily intended for children 12 years of age or younger.

(Comment 30) - One commenter states that the proposed rule should explicitly exclude from the definition of children's product electronically-aided musical instruments and musical devices that are preprogrammed by the user or the manufacturer.

(Response 30) - We agree that the preprogrammed sounds and demonstration pieces in electronically-aided musical instruments would be considered general use products. However, toys that have preprogrammed sounds will continue to be considered children's products. Accordingly, we have revised the rule to add "including electronically-aided musical instruments" after "Musical instruments."

The Commission notes that if a distributor or retailer sells or rents in bulk, general use musical instruments through distribution channels that target children 12 years of age or younger in educational settings, such as schools or summer camps, this type of a distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes, labeling, or instructions that the product is designed or intended primarily for children 12

years of age or younger, then it may be considered a children's product if the required consideration of all four statutory factors supports that determination.

26. *Other Issues*

(Comment 31) - One commenter states that the effective date should be delayed to give manufacturers an opportunity to evaluate whether or not their products are children's products pursuant to this rule.

(Response 31) - Because this is an interpretative rule, a delayed effective date is not required by the Administrative Procedure Act (5 U.S.C. 553(d)).

(Comment 32) - A few commenters raise issues with footwear. These commenters state that there is no certainty as to whether an article of footwear is a children's product and that the issue is confused especially with youth footwear. According to the commenters, many 12-year-olds wear adult footwear and that size does not necessarily relate to age. The commenters request an objective standard of footwear of 24 centimeters (cm) or more as being intended for adults.

(Response 32) - We believe that the manufacturer is in the best position to make an initial determination regarding whether footwear is primarily intended for children 12 years of age or younger. However, we will rely

on the statutory factors, rather than a single factor since it is possible that other features can strongly indicate that the footwear is intended primarily for children 12 years old or younger even though the length of the footwear exceeds 24 cm.

List of Subjects 16 CFR Part 1200

Business and industry, Infants and children, Consumer protection, Imports, Toys

D. Conclusion

For the reasons stated above, the Commission adds 16 CFR part 1200 to read as follows:

PART 1200 - DEFINITION OF CHILDREN'S PRODUCT UNDER THE CONSUMER PRODUCT SAFETY ACT

Authority: 15 U.S.C. 2052(2)

1200.1 Purpose

This part provides guidance on the definition of children's product and the factors the Commission will consider when making determinations regarding children's products as set forth under 15 U.S.C. 2052(2).

§ 1200.2 Definition of Children's Product:

(a) *Definition of "Children's Product"* - Under section 3(a)(2) of the Consumer Product Safety Act (CPSA), a children's product means a consumer product designed or intended primarily for children 12 years of age or younger.

The term "designed or intended primarily" applies to those consumer products mainly for children 12 years old or younger. Whether a product is primarily intended for children 12 years of age or younger is determined by considering the four specified statutory factors. These factors are:

- A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.
- Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.
- Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.
- The Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

The examples discussed herein may also be illustrative in making such determinations; however, the determination of whether a product meets the definition of a children's product depends on factual information that may be unique to each product and, therefore, would need to be made on a case-by-case basis. The term "for use" by children 12

years or younger generally means that children will physically interact with such products based on the reasonably foreseeable use of such product. Toys and articles that are subject to the small parts regulations at 16 CFR Part 1501 and in ASTM F963 would fall within the definition of children's product since they are intended for children 12 years of age or younger. Toys and other articles intended for children up to 96 months (8 years old) that are subject to the requirements at 16 CFR 1500.48 through 1500.49 and 16 CFR 1500.50 through 1500.53 would similarly fall within the definition of children's product given their age grading for these other regulations. Therefore, a manufacturer could reasonably conclude on the basis of the age grading for these other regulations that its product also must comply with all requirements applicable to children's products including, but not limited to, those under the Federal Hazardous Substances Act, ASTM F963, "Standard Consumer Safety Specification for Toy Safety," and the Consumer Product Safety Improvement Act of 2008.

(b) *Definition of "General Use Product"* - (1) A general use product means a consumer product that is not designed or intended primarily for use by children 12 years old or younger. General use products are those consumer

products designed or intended primarily for consumers older than age 12. Some products may be designed or intended for use by consumers of all ages, including children 12 years old or younger, but are intended mainly for consumers older than 12 years of age. Examples of general use products may include products with which a child would not likely interact, or products with which consumers older than 12 would be as likely, or more likely to interact. Products used by children 12 years of age or younger that have a declining appeal for teenagers are likely to be considered children's products.

(2) Other products are specifically not intended for children 12 years of age or younger. These products, such as cigarette lighters, candles, and fireworks, which the Commission has traditionally warned adults to keep away from children, are not subject to the CPSIA's lead limits, tracking label requirement, and third-party testing and certification provisions. Similarly, products that incorporate performance requirements for child resistance are not children's products as they are designed specifically to ensure that children cannot access the contents. This would include products such as portable gasoline containers and special packaging under the Poison Prevention Packaging Act.

(c) *Factors Considered* - To determine whether a consumer product is primarily intended for a child 12 years of age or younger the four specified statutory factors must be considered together as a whole. The following four factors must be considered:

(1) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable. A manufacturer's statement about the product's intended use, including the product's label, should be reasonably consistent with the expected use patterns for a product. A manufacturer's statement that the product is not intended for children does not preclude a product from being regulated as a children's product if the primary appeal of the product is to children 12 years of age or younger, as indicated, for example, by decorations or embellishments that invite use by the child, being sized for a child or being marketed to appeal primarily to children. Similarly, a label indicating that a product is for ages 9 and up does not necessarily make it a children's product if it is a general use product. Such a label may recommend 9 years old as the earliest age for a prospective user, but may or may not indicate the age for which the product is primarily

intended. The manufacturer's label, in and of itself, is not considered to be determinative.

(2) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

(i) These representations may be express or implied. For example, advertising by the manufacturer expressly declaring that the product is intended for children 12 years of age or younger will support a determination that a product is a children's product. While, for example advertising by the manufacturer showing children 12 years of age or younger using the product may support a determination that the product is a children's product. These representations may be found in packaging, text, illustrations and/or photographs depicting consumers using the product, instructions, assembly manuals, or advertising media used to market the product.

(ii) The product's physical location near, or visual association with, children's products may be a factor in making an age determination, but is not determinative. For example, a product displayed in a children's toy section of a store may support a determination that the product is a children's product. However, where that same product is also sold in department

stores and marketed for general use, further evaluation would be necessary. The Commission recognizes that manufacturers do not necessarily control where a product will be placed in a retail establishment and such lack of control will be considered. The Commission evaluates products more broadly than on a shelf-by-shelf or store-by-store basis.

(iii) The product's association or marketing in conjunction with nonchildren's products may not be determinative as to whether the product is a children's product. For example, packaging and selling a stuffed animal with a candle would not preclude a determination that the stuffed animal is a children's product since stuffed animals are commonly recognized as being primarily intended for children.

(3) Whether the product is commonly recognized by consumers as being intended for use by children 12 years of age or younger. Consumer perception of the product's use by children, including its reasonably foreseeable use, will be evaluated. Sales data, market analyses, focus group testing, and other marketing studies may help support an analysis regarding this factor.

(i) Features and Characteristics -

additional considerations that may help distinguish children's products from nonchildren's products include:

- (A) Small sizes that would not be comfortable for the average adult;
- (B) Exaggerated features (large buttons, bright indicators) that simplify the product's use;
- (C) Safety features that are not found on similar products intended for adults;
- (D) Colors commonly associated with childhood (pinks, blues, bright primary colors);
- (E) Decorative motifs commonly associated with childhood (such as animals, insects, small vehicles, alphabets, dolls, clowns, and puppets);
- (F) Features that do not enhance the product's utility (such as cartoons) but contribute to its attractiveness to children 12 years of age or younger; and
- (G) Play value, i.e., features primarily attractive to children 12 years of age or younger that promote interactive exploration and imagination for fanciful purposes (whimsical activities lacking utility for accomplishing mundane tasks; actions performed for entertainment and amusement).

(ii) Principal use of the product - the principal uses of a product take precedence over other actions that are less likely to be performed with a product. For example, when a child pretends that a broom is a horse, that does not mean the item is a children's product because the broom's principal use is for sweeping;

(iii) Cost - the cost of a given product may influence the determination of the age of intended users; and

(iv) Children's interactions, if any, with the product - products for use in a child's environment by the caregiver but not for use by the child would not be considered to be primarily intended for a child 12 years of age or younger.

(4) The Age Determination Guidelines issued by the Consumer Product Safety Commission staff in September 2002, and any successor to such guidelines. The product's appeal to different age groups and the capabilities of those age groups may be considered when making determinations about the appropriate user groups for products.

(d) *Examples* - To help manufacturers understand what constitutes a children's product under the CPSA, the

following additional examples regarding specific product categories are offered:

(1) Furnishings and Fixtures - general home furnishings and fixtures (including, but not limited to: rocking chairs, shelving units, televisions, digital music players, ceiling fans, humidifiers, air purifiers, window curtains, tissue boxes, rugs, carpets, lamps, clothing hooks and racks) that often are found in children's rooms or schools would not be considered children's products unless they are decorated or embellished with a childish theme and invite use by a child 12 years of age or younger, are sized for a child, or are marketed to appeal primarily to children. Examples of home or school furnishings that are designed or intended primarily for use by children and considered children's products include: infant tubs, bath seats, small bean bag chairs with childish decorations, beds with children's themes, child-sized desks, and child-sized chairs. Decorative items, such as holiday decorations and household seasonal items that are intended only for display, with which children are not likely to interact, are generally not considered children's products, since they are intended to be used by adults.

(2) Collectibles - Adult collectibles may be distinguished from children's collectibles by themes that

are inappropriate for children 12 years of age or younger, have features that preclude use by children during play, such as high cost, limited production, fragile features, display features (such as hooks or pedestals), and are not marketed alongside children's products (for example, in a children's department) in ways that make them indistinguishable from children's products. For example, collectible plush bears have high cost, are highly detailed, with fragile accessories, display cases, and platforms on which to pose and hold the bears. Children's bears have lower costs and simple accessories that can be handled without fear of damage to the product. Another example of collectible items includes model railways and trains made for hobbyists.

(3) Jewelry - Jewelry intended for children is generally sized, themed, and marketed to children. The following characteristics may cause a piece of jewelry to be considered a children's product: size; very low cost; play value; childish themes on the jewelry; sale with children's products (such as a child's dress); sale with a child's book, a toy, or party favors; sale with children's cereal or snacks; sale at an entertainment or educational event attended primarily by children; sale in a store that contains mostly children's products; and sale in a vending

machine. In addition, many aspects of an item's design and marketing are considered when determining the age of consumers for whom the product is intended and will be purchased including: advertising; promotional materials; packaging graphics and text; dexterity requirements for wearing; appearance (coloring, textures, materials, design themes, licensing, and level of realism); and cost. These characteristics will help jewelry manufacturers and consumers determine whether a particular piece of jewelry is designed or intended primarily for children 12 years of age or younger.

(4) DVDs, Video Games, and Computer Products - Most computer products and electronic media, such as CDs, DVDs, and video games, are considered general use products. However, CDs and DVDs with encoded content that is intended for and marketed to children, such as children's movies, games, or educational software may be determined to be children's products. CPSC staff may consider ratings given by entertainment industries and software rating systems when making an age determination. In addition, electronic media players and devices that are embellished or decorated with childish themes that are intended to attract children 12 years of age or younger, are sized for children, or are marketed to appeal primarily to children, are not likely to

fall under the general use category where children 12 years or younger likely would be the primary users of such devices. However, electronic devices such as CD players, DVD players, game consoles, book readers, digital media players, cell phones, digital assistant communication devices, and accessories to such devices that are intended mainly for children older than 12 years of age or adults are products for general use.

(5) Art Materials - Materials sized, decorated, and marketed to children 12 years of age or younger, such as crayons, finger paints, and modeling dough, would be considered children's products. Crafting kits and supplies that are not specifically marketed to children 12 years of age or younger likely would be considered products intended for general use. Consideration of the marketing and labeling of raw materials and art tools (such as modeling clay, paint, and paint brushes) may often be given high priority in an age determination because the appeal and utility of these raw materials has such a wide audience. If a distributor or retailer sells or rents a general use product in bulk (such as a raw art materials or art tools) through distribution channels that target children 12 years of age or younger in educational settings, such as schools, summer camps, or child care facilities, this type of a

distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes, labeling, or instructions that the product is designed or intended primarily for children 12 years of age or younger, then it may be considered a children's product if the required consideration of all four statutory factors supports that determination.

The requirements of the Labeling of Hazardous Art Materials Act are similar to the labeling requirements of the FHSA, of which it is a part. Therefore, third party testing to LHAMA is not required. An art material designed or intended primarily for children 12 years of age or younger would have to be tested by a third party laboratory to demonstrate compliance with CPSIA, but it would not require third party testing and certification to the LHAMA requirements. For the same reasons, no general conformity certificate is required for general use art materials.

(6) Books - The content of a book can determine its intended audience. Children's books have themes, vocabularies, illustrations, and covers that match the interests and cognitive capabilities of children 12 years of age or younger. The age guidelines provided by

librarians, education professionals, and publishers may be dispositive for determining the intended audience. Some children's books have a wide appeal to the general public, and in those instances, further analysis may be necessary to assess who the primary intended audience is based on consideration of relevant additional factors, such as product design, packaging, marketing, and sales data.

(7) Science Equipment - Microscopes, telescopes, and other scientific equipment that would be used by an adult, as well as a child, are considered general use products. Equipment that is intended by the manufacturer for use primarily by adults, although there may be use by children through such programs, is a general use product. Toy versions of such items are considered children's products. If a distributor or retailer sells or rents a general use product in bulk through distribution channels that target children 12 years of age or younger in educational settings, such as schools or summer camps, this type of a distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes, labeling, or instructions that the product is designed or intended primarily for children 12 years of age or younger,

then it may be considered a children's product if the required consideration of all four statutory factors supports that determination. Products mainly intended for use by the instructor would not be considered children's products.

In general, scientific equipment that is specifically sized for children, such as protective gear, eyewear, gloves, or aprons and/or has childish themes or decorations and invites use by a child 12 years of age or younger or is marketed to appeal primarily to children is considered a children's product

(8) Sporting Goods and Recreational Equipment - Sporting goods that are intended primarily for consumers older than 12 years of age are considered general use items. Sporting equipment, sized for adults, are general use items even though some children 12 years of age or younger will use them. Unless such items are specifically marketed to children 12 years of age or younger, or have extra features that make them more suitable for children 12 years of age or younger than for adults, they would be considered general use products. If children 12 years or younger would mainly use the product because it would be too small or inappropriate for older children to use, then it likely would be considered a children's product.

Likewise, recreational equipment, such as roller blades, skateboards, bicycles, camping gear, and fitness equipment are considered general use products unless they are sized to fit children 12 years of age or younger and/or are decorated with childish features by the manufacturer.

(9) Musical Instruments - Musical instruments, including electronically-aided instruments suited for an adult musician, are general use products. Instruments intended primarily for children can be distinguished from adult instruments by their size and marketing themes. The Commission notes that if a distributor or retailer sells or rents in bulk, a general use musical instrument through distribution channels that target children 12 years of age or younger in educational settings, such as schools or summer camps, this type of a distribution strategy would not necessarily convert a general use product into a children's product. However, if the product is packaged in such a manner that either expressly states or implies with graphics, themes, labeling, or instructions that the product is designed or intended primarily for children 12 years of age or younger, then it may be considered a children's product if the required consideration of all four statutory factors supports that determination.

Dated: October 6, 2010

Todd A. Stevenson

Todd A. Stevenson, Secretary
Consumer Product Safety Commission